

# **COMMITTEE FOR PUBLIC COUNSEL SERVICES**

## **PERFORMANCE STANDARDS**

### **GOVERNING THE REPRESENTATION OF CLIENTS ON CRIMINAL APPEALS AND POST-CONVICTION MATTERS**

These standards are intended for use by the Committee for Public Counsel Services in evaluating, supervising and training counsel assigned pursuant to G.L. c. 211D. Counsel assigned pursuant to G.L. c. 211D must comply with these standards and the Massachusetts Rules of Professional Conduct. In evaluating the performance or conduct of counsel, the Committee for Public Counsel Services will apply these standards and the Massachusetts Rules of Professional Conduct, as well as all CPCS policies and procedures included in this manual and other CPCS publications.

1. The role of appellate defense counsel is to diligently and zealously seek to obtain redress of the convicted client's rights and interests through the appellate process on all matters within the scope of counsel's assignment. It is counsel's duty to give the client counsel's undivided loyalty free of any conflicts of interest, and to maintain the confidentiality of all client communications. Counsel's commitment to these duties and obligations must remain unaffected by the client's indigent status, the client's background, or the nature of the case. All clients deserve and must be afforded the same undivided loyalty, confidentiality, competent representation, and zealous advocacy.
2. Immediately upon receipt of the assignment of a direct appeal or new trial motion, the appellate defender shall: (a) file an appearance in the appropriate court, (b) communicate with the client to inform the client of the assignment, and (c) determine that the necessary transcripts and tapes have been ordered.

Immediately upon receipt of the assignment of a screening concerning a motion to withdraw guilty plea, the appellate defender shall communicate with the client to inform the client of the assignment, but should only file an appearance after the appellate defender has conducted a review and determined that there is a meritorious basis for the motion.

Upon receipt of the assignment of a screening other than a motion to withdraw guilty plea, the appellate defender may, but is not required to, contact the defendant. The appellate defender in a screening assignment other than a motion to withdraw guilty plea should file an appearance in court only after assignment of counsel has been approved by the Director of Criminal Appeals, Private Counsel Division, as the Chief Counsel's designee.

3. The appellate defender shall keep the client informed of all significant developments in the client's case. The appellate defender shall respond in a timely manner to all correspondence of a reasonable volume and frequency. The appellate defender shall accept collect telephone calls from an incarcerated client of a reasonable number and frequency.
4. Within three weeks after the receipt of the transcript, the appellate defender shall have read the entire transcript of the case. If the appellate defender is still subject to CPCS' mentor requirements, as determined by the Director of Criminal Appeals, Private Counsel Division, the appellate defender shall immediately provide the mentor with a copy of the transcript and shall confer with the mentor as to the issues to be raised in the appeal. Whether or not still subject to mentor requirements, the appellate defender may also confer at any time with the Director or the staff attorneys of the Criminal Appeals Unit of the Private Counsel Division.

5. After reading the transcript, the appellate defender shall visit the client at the institution at which the client is incarcerated, or, if the client is not incarcerated, shall invite the client to visit the appellate defender at the appellate defender's office, for the purpose of conferring with the client about the issues that may be raised on the client's appeal.
6. If specifically requested by the client, the appellate defender must provide the client with a copy of the transcript and other trial-related materials and/or a copy of a draft of the brief.
7. If, after the conference described in Standard 5, the client insists on having briefed a contention that, in the judgment of the appellate defender, cannot be supported by any rational argument, the appellate defender (a) shall inform the client of the client's right with respect to such contention pursuant to *Commonwealth v. Moffett*, 383 Mass. 201, 203-209 (1981); and (b) shall supply the client with a copy of the *Moffett* opinion. If the client thereafter wishes to invoke his or her *Moffett* rights with respect to such contention, the appellate defender shall comply in all respects with the guidelines of the *Moffett* case set forth id. at 208-209 & n. 3.
8. If it appears to the appellate defender that, in light of the standards set forth in *Commonwealth v. Hodge (No. 1)*, 380 Mass. 851, 855 (1980), there is a reasonable possibility that an incarcerated client might receive a stay of sentence pursuant to Rule 31 of the Massachusetts Rules of Criminal Procedure or Rule 6 of the Massachusetts Rules of Appellate Procedure, the appellate defender shall bring in the appropriate court a motion to stay the client's sentence.
9. The appellate defender must be familiar with and must comply with all court rules and standing orders, including the Massachusetts Rules of Criminal Procedure and Appellate Procedure, as well as the Rules and Standing Orders of the Supreme Judicial Court and the Appeals Court, and particularly with Appeals Court Standing Order 17A.
10. The appellate defender shall timely file in the appropriate court all motions necessary or advisable to preserve and perfect the client's appellate rights, including, where necessary, motions pursuant to Rule 14(b) of the Massachusetts Rules of Appellate Procedure to enlarge the time for filing the brief on behalf of the client, and motions pursuant to Rule 8 of the Massachusetts Rules of Appellate Procedure to correct or expand the record.
11. The appellate defender shall take the measures necessary to cure unreasonable delay in the production and assembly of the record on appeal, particularly the production of transcripts and tapes of the trial court proceedings. Such measures include contacting the court clerk, court reporter, or court administration and, if necessary, seeking a court order to cure unreasonable delay.
12. The appellate defender shall not file or litigate a motion for new trial (Mass. R. Crim. P. 30) or any other collateral attack on the defendant's conviction without first having obtained the approval of the Director of Criminal Appeals, Private Counsel Division.
13. The brief filed by the appellate defender on behalf of the client shall conform in all respects with Rules 16, 18, and 20 of the Massachusetts Rules of Appellate Procedure and shall be of high quality.
14. In any case in which the defendant faces lengthy incarceration, probation, or parole, the appellate defender shall consider whether there are federal constitutional claims which, in the event that relief is denied in the state appellate courts, could form the basis for a successful petition for a writ of habeas corpus in federal district court. If so, the appellate defender should raise and argue such federal constitutional claims, unless the appellate defender concludes that there is a tactical basis for not including such claims and the client assents.

15. The appellate defender shall transmit to the client a copy of the brief filed on the client's behalf, and shall also transmit to the client a copy of the brief for the Commonwealth as well as copies of all other substantive documents in the appellate proceedings. Assigned counsel must also submit a copy of the brief or new trial motion to the Criminal Appeals Unit, Private Counsel Division.

16. Because there is no longer a right to oral argument in every criminal appeal, the appellate defender shall file a reply brief when necessary to respond to any portion of the Commonwealth's brief that either (i) raises significant new issues not discussed in the appellant's brief; or (ii) materially misrepresents the facts or the law, or (iii) materially misrepresents the issues or arguments raised in the appellant's brief.

17. The appellate defender shall promptly inform the client of the date, time and place scheduled for oral argument of the appeal as soon as the appellate defender receives notice thereof from the appellate court. The appellate defender shall not waive oral argument except in very unusual circumstances and only after (i) obtaining the approval of the Director of Criminal Appeals for the waiver and (ii) obtaining the client's consent to waive oral argument.

18. The appellate defender shall promptly inform the client by letter of the decision of the appellate court in the client's case and shall promptly transmit to the client a copy of the decision.

19. If the decision of the Appeals Court is adverse to the client in whole or in part, the appellate defender shall promptly inform the client of the client's right pursuant to Rule 27.1 of the Massachusetts Rules of Appellate Procedure to make application to the Supreme Judicial Court for further appellate review of the case. Unless the client instructs the appellate defender not to do so, the appellate defender shall prepare and file on the client's behalf an application to the Supreme Judicial Court for further appellate review of the case within the time prescribed by said Rule 27.1. When the Supreme Judicial Court has ruled on the application for further appellate review, the appellate defender shall promptly inform the client by letter of the ruling.

20. In the event that the client's appeal is unsuccessful, the appellate defender shall have the discretion, upon the request of the client and subject to the approval of the Chief Counsel or the Chief Counsel's designee, to seek relief from the client's conviction by petition for writ of certiorari to the United States Supreme Court or in state court by a motion for new trial or other post-conviction relief when in the best judgment of the appellate defender there exists a reasonable possibility that such relief may be obtained.

21. In the event that the client's appeal is unsuccessful, the appellate defender shall advise the client of his right to seek federal habeas corpus relief if such relief is potentially available. Upon the request of the client, and subject to the approval of the Chief Counsel or the Chief Counsel's designee, the appellate defender shall request authorization for the appellate defender, or other counsel, to seek federal habeas corpus relief on behalf of the client, when in the best judgment of the appellate defender there exists a reasonable likelihood that such relief may be obtained.

22. In any case in which federal habeas corpus relief is potentially available but in which the appellate defender does not continue representation, the appellate defender shall explain to the client the one-year statute of limitations for the filing of a petition for a writ of habeas corpus in federal district court or for the filing of a motion for new trial in the state trial court when necessary to exhaust any federal constitutional issues for federal habeas review.

23. If a direct appeal is unsuccessful and a motion to revise and revoke sentence pursuant to Mass. R. Crim. P. 29 was either never previously filed or had been filed but denied, the appellate defender shall inform the client of the opportunity to file within sixty (60) days a motion to revise and revoke sentence and, if the client requests, shall timely file such motion so as to preserve the client's rights under Mass. R. Crim. P. 29. The appellate defender is authorized to further litigate the motion to revise and revoke but is not required to do so.

24. Representing clients before the Appellate Division of the Superior Court is the responsibility of trial counsel. However, if trial counsel is unable to represent the client before the Appellate Division of the Superior Court, then the appellate defender is obligated to do so.